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Supreme Court of the United States

October Term, 1973

No. 73-631

HOWARD JOHNSON CO., INC.,

Petitioner,

v.

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED[1]

1. Did the courts below err in holding that a company which purchases the assets of an employer and continues without interruption to operate at the same location, a business which provides the same products and services to the same class of customers, with a workforce of almost identical size, is a "successor" for purposes of an action under § 301 to enforce a promise to arbitrate in a contract

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[1] Respondent accepts Petitioner's statement of the opinions below, jurisdiction, and the statutes involved.

between the original employer (the seller) and a union, even though the purchaser chooses to retain substantially less than a majority of the seller's employees?

2. If the answer to the first question is that the courts below were correct in holding that such a purchaser is a "successor," did those courts err in holding further that the "successor" is required to arbitrate pursuant to the arbitration provision of the contract between the original employer and the union, the extent, if any, of the "successor's" obligations under that contract?

STATEMENT OF THE CASE[2]

A. The Facts On Which The Union's Claim Is Based.

This case was decided on the basis of a stipulation of facts. In its Memorandum Opinion the District Court set out a resume of those facts, (Pet. App. 13a-15a), which we shall, except as indicated in footnotes, adopt as our own.

The Howard Johnson Motor Lodge and the Belleville Restaurant were owned and operated by two corporations controlled by the Grissom family (hereafter referred to as "Grissoms").[3] Grissoms operated these businesses under franchising agreements entered into with Howard John-

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[2] Throughout this brief "A." will refer to the Appendix in this Court; "Pet. App." will refer to the Appendix to the Petition for Certiorari which contains the opinions and orders of the courts below.

[3] The District Court referred to the Grissom family and the corporations which it controlled as "Grissom." In order to preserve uniformity with petitioner's brief, we shall throughout refer to them as "Grissoms." We shall alternatively refer to Howard Johnson Co., Inc., the petitioner herein, as "the Company" or "Howard Johnson."

son Company, Inc., a Maryland corporation, on December 12, 1959 and August 18, 1960.

The 1959 "License Agreement" involves the franchising of the Howard Johnson Motor Lodge and is a strikingly comprehensive and stringently controlling document; for example, the Agreement provides that the Company shall determine and approve standards of construction, operation and service; that Company supervisory shall have the right to enter the premises at any reasonable time for that purpose; that approval must be obtained for furniture, utensils, stationery, supplies, etc., bearing the "Howard Johnson" trade name; that repairs and painting will be done at the reasonable behest of the Company; that the licensee will not seek to employ any persons employed by another franchisee; that certain insurance is to be carried; that the licensee give the Company the first option to purchase in the event of a contemplated sale and in the event the Company declines to purchase, the successor must be approved by the Company.

The restaurant "Operator's Agreement" is of identical import with the added feature of the requirement that the franchisee purchase from the Company all supplies or products manufactured or sold by the Company which the franchisee may need for use or sale at the restaurant.

In pursuant of said agreements, Grissoms operated the Motor Lodge and Restaurant and entered into collective bargaining agreements with the Union as the certified representative of the employees at both businesses. These agreements provide, among other things, that grievances shall be resolved by Arbitration (Exhibit A, Article IX,

Exhibit B, Article III)[4] and that the agreements shall be binding up on the "successors, assigns, purchasers, or transferees" of Grissoms (Exhibit A, Article XVIII, as to Motor Lodge Employees).[5]

Subsequently, Grissoms entered into negotiations for the sale, transfer and lease of its holdings[6] in the two busi-

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[4] See A. 89a-90a, 99a-100a. The text of the arbitration provision of the hotel agreement the restaurant agreement does not differ materially) is as follows:

"ARTICLE IX

"GRIEVANCES—ARBITRATION

"*Section 1.* If an employe has a grievance under the terms and provisions of this Agreement, it shall be handled in the manner hereinafter set-forth:

"*Step 1.* The aggrieved employe or the Union shall take the grievance up with his department head.

"*Step 2.* If the grievance is not settled under Step 1, the aggrieved employe shall take the grievance up with the local Union who shall attempt to adjust the matter with Management..

"*Step 3.* If the grievance cannot be settled by Step 2, it shall be presented by the Union to the Employer who shall make a decision in two (2) weeks. If the decision of the Employer is unacceptable either to the Union or to the Employer, either party shall have the right to demand arbitration in accordance with the following step.

"*Step 4.* The arbitrator shall be selected from a list furnished by the American Arbitration Association within two (2) weeks after such list is furnished to the parties. Upon the appointment of an arbitrator selected from a list furnished by the American Arbitration Association, the subject matter of the grievance shall be submitted to the arbitrator within five (5) days after the selection of the arbitrator unless the parties mutually agree upon a longer period of time. Evidence shall be submitted by both parties within ten (10) days thereafter. The decision of the arbitrator shall be final and con-

nesses to the Howard Johnson Company and on June 16, 1972, an Agreement was executed by the respective parties which called for an effective cessation date and time of July 23, 1972, at 11:59 P.M. That is, that the Company would assume the operation of both businesses pursuant to the Agreement, as of 12:01 A.M., July 24, 1972.

On June 28, 1972, the Company mailed to Grissoms an amendatory letter which provided that the Company would not recognize and assume any labor agreements then extant. Grissoms signed an acknowledgment and confirmation on July 11, 1972.

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clusive upon both parties and both parties agree to abide by the award of the arbitrator. The fees and expenses of the arbitrator shall be shared equally between the parties. Failure of the parties to agree upon an arbitrator within the period of time set-forth above shall give the employe the right to strike to solve unsettled grievances.

"*Section 2.* An arbitrator shall not have any right or authorization to add to, subtract from or modify the terms and provisions of this Agreement. Further, the extension, modification or amendment of this Agreement shall not be the subject matter of any grievance or arbitration procedure."

[5] A. 93a; see also A. 108a-109a, Art. XIII as to restaurant employees.

[6] The Sales Agreement provided that the Company would purchase from the Grissoms for the price of $10.00:

"Chattels, fixtures, furniture, furnishings, equipment, machinery, appliances, implements, utensils, silverware, china, linen inventory and all other personal property belonging to the Sellers and located in, or used in connection with a Howard Johnson's Motor Lodge located at 45945 Willow Run Expressway, Belleville, Michigan, and a Howard Johnson's Restaurant located at 45915 Willow Run Expressway, Belleville, Michigan or property more particularly described in Schedule I and II

On July 9, 1972, Notices to Employees of both businesses were posted advising of the termination of employment as of Midnight, July 23, 1972. Some personal contact between the Company and the Union commenced on July 11, 1972.[7] On July 13, 1972, registered mail notices were sent to the Union advising of the termination of business by Grissoms at the aforesaid date and time.

The Company began interviewing prospective employees on July 10, 1972, and hired the first employee on July 18, 1972. It commenced training of employees on July 20, 1972, at another location.

The Company commenced operation at both businesses

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annexed hereto and made a part hereof, and the appurtenances thereof and thereto, respectively in the above mentioned and described premises, on the following terms and conditions." (A. 40a)

[7] The conversation between the representatives of the Union and the Company was described by Company counsel as follows:

"On July 11, 1972, a Mr. Robert Corrigan—who I believe is a representative of the plaintiff Union—had a telephone conversation with a representative of my client. And Mr. Corrigan was advised that Howard Johnson Company would not recognize any collective bargaining agreement with the Union for either the Restaurant or the Motor Lodge. The wording was, 'The Howard Johnson Company does not accept or recognize any alleged contracts for either the Restaurant or the Motor Lodge or any successor clauses contained therein. It will not recognize the Union as the bargaining representative for the Restaurant or Motor Lodge unless or until it is certified by the National Labor Relations Board as the bargaining representative of employees in an appropriate union.'

"I am further advised that Mr. Corrigan stated that he understood the position of the Company and stated, "It looks like we have trouble." (A. 27a)

at 12:01 A.M., July 24, 1972 with 55 employees; of those 33 were engaged in the Restaurant and 9 of them were former Grissoms employees. None of the supervisory personnel of Grissoms were retained by the Company. The number employed by Grissoms at the time of the changeover was 53.

B. The Proceedings Below.

Having been rebuffed by Howard Johnson, the Union brought this suit to complete arbitration under § 301 of the Labor Management Relations Act of 1947 (hereafter "the Act") against the Grissoms and Howard Johnson. The action was commenced in the Circuit Court of Wayne County and was removed by the Company to the United States District Court, Eastern District of Michigan. The District Court (Philip Pratt, J.), concluded that Howard Johnson was a successor, as that term has been understood in the § 301 law, and that it was under a duty to arbitrate with the Union. In its opinion the court explained the scope of the relief it would grant.

> "Thus, this order to arbitrate does not contemplate that it be tantamount to an order that the Company honor the collective bargaining agreement. Rather, it is emphasized, it is an order based on Section 301 and in conformance with the direction of *Burns* which is contained in the following language:
>
> '[*Wiley* held only that] the agreement to arbitrate, survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by *other provisions of the contract.*' 40 U.S.L.W. at 4503. (emphasis supplied [by District Court])." (Pet. App. 22a-23a)

And, thereafter, the District Court did enter an order to arbitrate in the following terms:

> "IT IS HEREBY ORDERED that Defendants, Howard Johnson Company, Inc. and Belleville Restaurant Company, Inc. and P. L. Grissom & Son, Inc., arbitrate with Plaintiff, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, issues arising under the collective bargaining agreements between Plaintiff and Defendants, Belleville Restaurant Company, Inc. and P. L. Grissom & Son, Inc., effective January 1, 1968 and August 1, 1968, respectively, relating to the obligation and liability of Defendants to Plaintiff and to the employees represented by Plaintiff under the provisions contained in the aforesaid agreements pursuant to the Memorandum Opinion of the Court issued on August 22, 1972." (Pet. App. 27a-28a)

That order denied the Union's motions for a preliminary injunction requiring the Company to hire or reinstate the former Grissoms employees who had been terminated, and for a remand of the case to the state court. Pet. App. 28a.

Howard Johnson alone appealed. The Court of Appeals for the Sixth Circuit unanimously affirmed the District Court's judgment in an opinion by Circuit Judge William E. Miller. Pet. App. 1a-12a.

SUMMARY OF ARGUMENT

I

In the instant § 301 suit, the Union obtained a court order requiring Howard Johnson to arbitrate the extent, if any, to which the Company is bound by the collective agreement between the Union and Grissoms in force at the time Johnson bought out Grissoms. That is the precise form of order issued in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, which was also a § 301 case brought to enforce an arbitration clause over a change in ownership.

Wiley holds that for such an order to issue there must be "substantial continuity of identity in the business enterprise before and after the change [in ownership]." (376 U.S. at 551.) That condition is satisfied here; indeed, the indicia of continuity are far more compelling in this case than in *Wiley*. This is a case "in which one owner replaces another but the business entity remains the same." (*Id.* at 550.) Before and after the change, and without any interruption, the employing enterprise was a Howard Johnson Motel and Restaurant providing the same class of customers the same goods and services, with a workforce of the same size and at the same facility.

The Company, which refused to hire more than a fraction of the prior workforce, argues that the foregoing indicia of continuity are insufficient on the ground "that the *sine qua non* for successorship is * * * [that] the prior owner's employees * * * [constitute] a present majority of the new employer's labor force." (Co. Br. 8.) That contention is flatly inconsistent with what was actually decided in *Wiley*. There too, the former owner's employees were a

minority of the new workforce. (376 U.S. at 545, 550-551, n. 5.) And as the court below well stated:

> "Howard Johnson's argument here attempts to pull itself up by its own bootstraps. It argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire, a majority of Grissoms' employees. (Pet. App 7a.)

Accord: *Monroe Sander* v. *Livingston*, 377 F.2d 6, 12 (C.A.2).

The Company says that its position coincides with the Board law of successorship under § 8 of the Act, as stated in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 277-282, and that that law must be carried over into § 301. But the standards the Board had developed for successorship in cases like *Burns* were directed to answering a different question, *viz.*, whether the alleged successor has a duty to bargin. The requirement that the Union be the representative of the successor's employees for bargaining purposes stems directly from § 9(a) of the Act to which § 8(a)(5) is subject. On the other hand, this Court has squarely held that the majority status standards of § 9(a) are not relevant in a suit to enforce a contract under § 301. *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, followed in *Wiley*, 376 U.S. at 551-552, n. 5.

II

The Company argues (Co.Br. 34-42) that even if it is a successor it cannot be required to arbitrate with the Union. Here again, the Company relies on *Burns*, and again fails to appreciate that the holding of that case was dependent upon the question there presented.

In *Burns*, the Board unsuccessfully argued, in reliance on *Wiley*, that a successor who has a duty to bargain is also required by § 8(a)(5) to adopt his predecessor's collective bargaining agreement. This Court, however, distinguished between the obligation to honor contracts imposed by § 301 and the duty to bargain under §§ 8(a)(5) and 8(d). The latter does not entail a duty to agree, and indeed, § 8(d) is an "express statutory mandate," (*Burns*, 406 U.S. at 283), to the Board not to foist agreements on the parties; but while, as *Burns* emphasized, the *making* of agreements was left to the free play of economic forces, agreements already made are binding and enforceable.

Congress deliberately committed the duty of enforcement not to the Board, in unfair labor practice proceedings, but to the courts according to "the usual processes of the law" (H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 42). These processes traditionally include enforcement of implied obligations. (*Perry* v. *Sindermann*, 408 U.S. 593; *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 111 N.E. 214 (Cardozo, J.).) That method of interpretation is familiar in suits under § 301, (e.g., *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95), and was utilized in deriving from § 203(d) the "now well-known presumption of arbitrability and labor disputes" (*Gateway Coal Co.* v. *United Mine Workers*, 42 U.S.L.Wk. 4095, 4098). It was that presumption that governed in *Wiley*. 376 U.S. 550. Where a collective bargaining agreement provides for arbitration, that presumption operates to commit any dispute to arbitration unless the parties have expressly excluded it. In the present context this enables a union and an employer to exclude the obligations of a potential successor employer

from arbitration; by contrast, the rule espoused by the Board in *Burns* would have required the successor to abide by the entire contract regardless of its terms.

The limited holding of *Wiley* is significant also because the "flexible procedures of arbitration" assure the successor that the extent of his obligations wil be determined within the confines of the agreement and on the basis of the realities and equities in each particular case:

> "The NLRB in its *Burns* decision had adopted an all-or-nothing approach. If the employer was a successor then it was required to honor *all* of the terms of the predecessor's agreement. If not a successor, it did not have to honor any part of the predecessor's agreement. *Burns Int'l. Services, Inc.*, 182 NLRB 348 (1970). * * * As noted by the Supreme Court in *Burns* the Board's position would lead to rigidity in labor relations. * * * In arbitration proceedings as ordered below such rigidity is not present." (Pet. App. 10a-11a.)

This Court's recent decision in *Golden State Bottling Co.* v. *NLRB*, 42 U.S.L.Wk. 4039 confirms our view that successorship problems must be analyzed according to their precise statutory context. For there the Court differentiated *Wiley* and *Burns* from each other and from *Golden State*. The short of the matter is that the equation which the Company seeks to draw between *Burns* and this case is the same equation which the Board unsuccessfully pressed between *Wiley* and *Burns*. Even as *Wiley* did not control *Burns*, *Burns* does not govern this case. For this case differs from *Burns*, even as it is identical to *Wiley*.

ARGUMENT

The court below held that under the principles declared by this Court in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (hereafter "*Wiley*"), Howard Johnson is the successor of Grissoms, and is under a duty, enforceable under § 301 of the Act, to arbitrate, pursuant to the arbitration clause in the collective agreement between Grissoms and the Union, the extent, if any, of Johnson's substantive obligations under that contract. (Pet. App. 4a-7a.) The court below also held that that obligation to arbitrate is not affected by this Court's decision in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (hereafter "*Burns*"). (Pet. App. 7a-11a.) In both respects the decision below was entirely correct.

I. *WILEY* ESTABLISHES THAT HOWARD JOHNSON IS GRISSOMS' SUCCESSOR FOR THE PURPOSES OF THIS § 301 SUIT.

A. The Holding of Wiley.

Mr. Justice Harlan, speaking for a unanimous Court, described the genesis of the *Wiley* case as follows:

> "District 65, Retail, Wholesale and Department Store Union, AFL-CIO, entered into a collective bargaining agreement with Interscience Publishers, Inc., a publishing firm, for a term expiring on January 31, 1962. The agreement did not contain an express provision making it binding on successors of Interscience. On October 2, 1961, Interscience merged with the petitioner, John Wiley & Sons, Inc., another publishing firm, and ceased to do business as a separate entity. There is no suggestion that the merger was not for genuine business reasons.

"At the time of the merger Interscience had about 80 employees, of whom 40 were represented by this Union. It had a single plant in New York City. Wiley was a much larger concern, having separate office and warehouse facilities and about 300 employees. None of Wiley's employees was represented by a union.

"In discussions before and after the merger, the Union and Interscience (later Wiley) were unable to agree on the effect of the merger on the collective bargaining agreement." (376 U.S. at 544-545.)

District 65 thereupon brought suit under § 301 of the Act to compel Wiley to arbitrate. This Court held that:

"[T]he disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." (*Id.* at 548.)

That holding was "fashioned 'from the policy of our national labor laws,' • • • *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456." (376 U.S. at 548.) Its first element was recognition of "the central role of arbitration in effectuating national labor policy," (*id.* at 549):

"In [*Steelworkers* v.] *Warrior & Gulf Navigation Co.* [363 U.S. 574], 578, arbitration was described as 'the substitute for industrial strife,' and as 'part and parcel of the collecttive bargaining process itself.' It would derogate from 'the federal policy of settling labor disputes by arbitration,' *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of

removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same."

The second element of *Wiley* was that national labor policy, which permits employers to determine questions pertaining to ownership among themselves, also provides a counterbalancing protection for the legitimate interests of the affected employees, by preserving a contractual arbitration obligation despite changes in ownership, so long as the employing industry continues:

> "[The] negotiations leading to a change in corporate ownership * * * will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.'" (*Id.* at 549.)

The final element of *Wiley's* rationale was that, since collective agreements are not in any case "the simple product of a consensual relationship," the national labor policy governing the duties of "successor" employers does not turn on the common-law doctrine that one who buys a busi-

ness is bound only by those agreements he agrees to assume:

> "[A] collective bargaining agreement is not an ordinary contract * * *. Central to the peculiar status and function of a collective bargaining agreement is the fact * * * that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate * * * must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (*Id.* at 550-551.)

Immediately thereafter Mr. Justice Harlan with characteristic care defined the scope of the Court's holding:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. There may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." (*Id.* at 551.)

He explained that there is *no* "lack of any substantial continuity of identity" where there is "relevant similarity and continuity of operation across the change in ownership." (*Id.*) After *Wiley* then, in cases in which

a union sues to compel arbitration with a party other than the original signatory to the collective agreement, the question is not whether that party "sign[ed] the contract being construed," but whether there is a "relevant similarity and continuity of operation across the change in ownership." When that test is satisfied the second employer's "successorship" is established, and if, as here (see pp. 4-5 n. 4, *supra*), the contract contains a broad arbitration clause, the successor's duty to arbitrate follows.[8]

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[8] At p. 22 of its brief Howard Johnson finally and grudgingly addresses itself to the *Wiley* decision "only because the Sixth Circuit below relies heavily upon it." The Company says, mistakenly and somewhat inconsistently, "that, in its holding on successorship, the Sixth Circuit did not cite *Wiley* or any other authority." (*Id.*, n. 18, compare Pet. App. 3-6). More importantly, the Company misstates *Wiley*, saying:

> "The majority status was unnecessary in Wiley, for the same employer was at all times involved, and only the rights and expectations of that employer's employees covered by the labor contract were at issue." (Co. Br. 22)

If that reading is correct, what was the successorship problem in *Wiley*? In the same vein, the Company says that "this Court was confronted with an employer who continued in existence, freely took substantially all of its former employees, and who had negotiated the contract at issue." (*Id.*) But as this Court reminded in *Golden State Bottling Co.* v . *NLRB*, ——U.S. ——, 42 U.S.L.Wk. 4039, 4043:

> "The agreement [sued upon in *Wiley*] originally had been entered into with another corporation which had subsequently merged with Wiley for genuine business reasons."

Of course, if one treats *Wiley* as if there had been only one employer throughout, that case is easily distinguishable from this. But if one reads *Wiley* correctly, and the Company's reading is not even arguable, the Union is plainly entitled to an order direct-

B. Howard Johnson Is Grissoms' Successor

1. As *Wiley* recognized, changes in ownership take many forms, and the degree of continuity over the change will, of course, vary. The nature and degree of continuity required to make one employer the successor of another also vary with the context of the inquiry. (See pp. 24-30, *infra*.) The *Wiley* opinion recognized that in some situations a purchase or merger would not result in a successorship for purposes of § 301 because the business was acquired not to operate it but to dispose of it. (376 U.S. at 551.) But it is not necessary in this case to determine where the line is to be drawn for purposes of § 301, if indeed the problem lends itself to resolution through a simple formula. Here there is unmistakably the "substantial continuity of identity of the business enterprise" required in *Wiley* (376 U.S. at 551), since this case is an instance in which "one owner replaces another * * *, [while] the business entity remains the same," (*id.* at 549), in the sense that the factors that set the parameters of labor-management relations are unchanged. Indeed, when the facts in this record are compared with the surrounding circumstances stated in the *Wiley* opinion, the conclusion of successorship reached in *Wiley* follows *a fortiori* in this case:

• Here there was a sale of assets to a purchaser which already had a substantial voice in the operation of the busi-

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ing Howard Johnson to arbitrate the scope of its obligations to the Union and the employees it represents under the agreement between the Union and Grissoms. And, again contrary to Co. Br. 22, that is all that the judgment below does; it does not "apply the former contract to the entire labor force." See Statement, p. 8 *supra*, quoting the District Court's Judgment, which the Sixth Circuit affirmed.

ness; in *Wiley* there was a merger with a former stranger to the enterprise. In Mr. Justice Harlan's view, the case for successorship was, if anything, less strong where "the contracting employer disappears into another by merger" than where "one owner replaces another." (376 U.S. at 549.)[9]

• Here the enterprise continued without interruption to provide the same services and products to the same class of customers; the *Wiley* opinion is silent as to the extent to which *Wiley* continued to publish the Interscience line.

• Here the operation of the business continued at the same location and indeed, in the same physical plant; in *Wiley* the former Interscience operation was brought into the *Wiley* plant.

• Here the business was continued by a complement of almost the exact size, which retained its identity separate and discrete from all other employees of Howard Johnson or its franchisees; in *Wiley* the Interscience workforce was integrated into the substantially larger Wiley workforce, and the opinion is silent as to the number of people who carried on what had been Interscience's work.

2. Each of the salient features of the relationship between Grissoms and Howard Johnson demonstrates "relevant similarity and continuity of operation across the

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[9] The Company suggests (Co. Br. 22) that since *Wiley* arose against the background of New York corporation law, which imposes certain obligations on the surviving corporation in a merger, its holding does not govern in assets acquisitions. But this Court has recently explained that this is not correct. *Golden State Bottling Co.*, 42 U.S.L.Wk. at 4043-4044, n. 5. See also, Pet. App. 7a, n. 10.

change in ownership." (376 U.S. at 551.) And *Wiley* holds that a successorship will be found unless there is a "lack of *any* substantial continuity of identity." (*Id.*, emphasis added.)[10] Yet, Howard Johnson argues "that it is a prerequisite to successorship that a majority of the new employer's

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[10] The Company says:

> "Surely, such factors as hiatus and purchase of certain operational assets could easily be different. Petitioner could have purchased dishes, linen and the like elsewhere, or kept the facilities closed for a period of time. So important a matter as employer-employee relations should not depend upon factors so tangential to the employment relationship." (Co. Br. 24, n. 25.)

But continuation of a business without interruption (that is, without "hiatus") is very strong, if not the strongest possible evidence of *continuity* in the employing industry. And the circumstance that "dishes, linen and the like" (*id.*) were purchased, which demonstrates, that the purchaser would perform the same function, (that is, operate a restaurant and motel), and that the same work would be performed, is far from "tangential to the employment relationship." Indeed, these factors show that the business would continue to be the operation of a *Howard Johnson* restaurant and a *Howard Johnson* motel, rather than, for example, a Holiday Inn restaurant and motel. For the Company painstakingly understates the "certain operational assets" which it acquired. The sales agreement provided that Howard Johnson would buy from Grissoms "chattels, implements, utensils, silverware, china, linen inventory and all other personal property belonging to the Sellers and located in, or used in connection with" Howard Johnson's Motor Lodge and the Howard Johnson's restaurant at these locations (A. 40a), which the Company contemporaneously agreed to lease (Pet. App. 14a). The total purchase price was $10.00. (*Id.*) That nominal amount is symptomatic of the prior franchisee/franchisor relationship between these parties, whereunder Johnson had the power to approve all furnishings, supplies, etc., used at the restaurant and the motor lodge, and required the purchase of some supplies directly from Howard Johnson. (Pet. App. 14a; A. 50-51, 61.)

labor force consist of employees of the former employer." (Co. Br. 15.)

That contention is flatly inconsistent with what was actually decided in *Wiley*. As we have already noted, the former Interscience employees were a ***minority*** of the new Wiley workforce. And the Court squarely confronted the contention, made by Wiley, that requiring it to arbitrate with the union would be inconsistent with the provisions of the National Labor Relations Act dealing with the selection of bargaining representatives and the duty to bargain:

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises. *Retail Clerks Int'l Assn., Local Unions Nos. 128 & 633*, v. *Lion Dry Goods, Inc.*, 369 U.S. 17. There is no problem of conflict with another union, cf. *L. B. Spear & Co.*, 106 N. L. R. B. 687, since Wiley had no contract with any union covering the unit of employees which received the former Interscience employees.
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> "Problems might be created by an arbitral award which required Wiley to give special treatment to the former Interscience employees because for rights found to have accrued to them under the Interscience contract. But the mere possibility of such problems cannot cut off the Union's right to press the employees' claims in arbitration. While it would be premature at this stage to speculate on how to avoid such hypothetical problems, we have little doubt that within the flexible procedures of arbitration a solution can be reached which would avoid disturbing labor relations in the Wiley plant." (376 U.S. at 551-552, n. 5).

The court below was merely following this Court's lead when it rejected Howard Johnson's contention:

> "Furthermore, we do not deem the refusal to hire a majority of Grissoms' employees to preclude the finding of successorship, at least in this § 301 action. Howard Johnson's argument here attempts to pull itself up by its own bootstraps. It argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire a majority of Grissoms' employees. Also to adopt the position urged by Howard Johnson would make the employees' jobs completely contingent on the employer's desire either to retain or to disregard the collective bargaining agreements. If Howard Johnson sought to retain the agreement negotiated by Grissoms, it would hire a majority of Grissoms' employees. If, on the other hand, it wished to disregard the collective bargaining agreement, it would simply hire none or at best only a few of the former employees. The decision whether to hire the predecessor's employees should turn upon other and more relevant considerations." (Pet. App. 7a)

And both the reasoning and result reached below are in accord with the only other Court of Appeals decision under § 301 in which an employer argued that notwithstanding other indicia of "continuity of identity" there can be no finding of successorship where the second employer refused to retain the prior employees. In *Monroe Sander* v. *Livingston*, 377 F.2d 6 (C.A.2), the court stated:

> "Appellants point to the fact that none of the former Sander employees were hired in New Jersey. The relevance of the successor's engaging its predecessor's employees, however, is to show similarity of opera-

tions. *Wiley*, 376 U.S. at [551], 84 S. Ct. 909. In this case, Sander's offer of preferential hiring was some evidence to that effect. Furthermore, there was other adequate evidence of identity of operations. Moreover, the failure to hire Sander employees in New Jersey could not be determinative where, as here, that failure is the nub of the dispute." (377 F.2d at 12).

Thus, there are no decisions which have read *Wiley* to require a continued employee majority.[11] As the Second Circuit appreciated, *Wiley's* reference to the retention of

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[11] Howard Johnson contends (Co. Br. pp. 17-20, 28) that *Printing Specialties Union No. 477* v. *Pride Papers Aaronson Bros. Paper Corp.*, 445 F.2d 361 (C.A.2), and *Boeing Co.* v. *International Ass'n. of Machinists & A. Wkrs.*, 351 F. Supp. 813 (M.D. Fla.) appeal pending, C.A.5, No. 73-1051, are such cases. We disagree.

In *Pride Papers* the Second Circuit concluded that where an individual sells his business and then utilizes the proceeds to buy into a separate going concern there is no evidence of "continuity in the business operation" (445 F.2d at 363-364); and it distinguished *Monroe Sander* on the ground that the latter was a case in which "continuity was evidenced by many factors," (*id.* at 364, n. 1). Thus, *Pride Papers* is consistent with the holding of *Monroe Sander*, *viz.*, that in a § 301 case where there is other evidence of continuity a refusal to hire the predecessor's employees does not preclude a finding of successorship. Moreover, the actual holding in *Pride Papers* was that even if the second employer had been a successor, the *Wiley* principle would not be applicable: first, because the union was not seeking arbitration; and, second, because there was at the new plant another union which represented all of the employees under an existing collective bargaining agreement. (*Id.* at 364) On the latter point the Second Circuit followed its own decision in *McGuire* v. *Humble Oil Refining Co.*, 355 F.2d 352 (C.A. 2), cert. denied 384 U.S. 988, which held that in that circumstance the duty to arbitrate does not survive, thereby resolving a question anticipated but not decided in *Wiley* (376 U.S. at 551-552, n. 5). Finally, the *Pride Papers* case followed the earlier Second Circuit

Interscience's employees did not establish a test of successorship, much less an overriding condition for a successorship finding, but described a circumstance which "adequately evidenced * * * relevant similarity and continuity of operations." (376 U.S. at 551.) Retention on a voluntary basis of the former employees by an employer, although he denies that he is bound by his predecessor's labor agreement, is an expression of his judgment that the operation has remained sufficiently similar to require the same employee skills, and confirms other objective evidence that there is "relevant similarity and continuity of operation." But his failure to retain those employees does not contradict such other evidence of continuity.

3. Despite the contrary holdings in *Wiley, Monroe Sander* and in this case below, the Company argues:

> "It has been consistently held, and reinforced in *Burns* that the *sine qua non* for successorship is continued employee majority status—i.e., whether a

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decision in *Burns*, not as Howard Johnson claims (Co. Br. p. 28), with respect to the test for successorship, but only with respect to the consequences of a finding of non-successorship. Thus the Company is simply incorrect when it argues that *Pride Papers* "recognized the indistinguishability" of the applicable successorship tests in § 301 cases and NLRB cases.

In *Boeing, supra*, the District Court did not state that *Wiley* by its own terms requires that a majority of the original employees be retained in order to establish successorship. Rather, the Court opined that "the *Burns* case has clarified the *Wiley* decision" (351 F. Supp. at 815), and that the retention of a majority of the predecessor's employees is the "standard of successorship" established by *Burns* (*id.* at 816). The question whether *Burns* "clarified" *Wiley* in the sense of declaring a new standard for successorship in § 301 cases lies at the heart of the present case and is discussed in the succeeding section of our brief.

> present majority of the new employer's labor force is composed of the prior owner's employees." (Co. Br. 8).

Since it cannot prevail if § 301 law is applied, Howard Johnson thereby places its reliance on the test for successorship established by the National Labor Relations Board in cases arising under § 8 of the Act. To justify that reliance Howard Johnson asserts that "the standards for determining successorship must be identical under § 158 [of 29 U.S.C.] and § 185 [of 29 U.S.C.]." (Co. Br. p. 24, initial caps omitted.) In this the Company errs. Because these different sections are designed to accomplish different purposes, wholesale adoption of the standards for determining who is a "successor" under one section into the other, is to repeat the error of legal analysis long ago identified by Walter Wheeler Cook:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." (Cook, *The Logical and Legal Bases of the Conflict of Laws*, p. 159, quoted with approval in *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 328.)

The authoritative statement of the Board law of successorship is part II of this Court's opinion in *Burns*, 406 U.S. at 277-282. That discussion can only be understood in light of the precise question which was there before the Court, and which Mr. Justice White identified in the first sentence of part II, the existence of "Burns' alleged duty to bargain with the union." (*Id.* at 277). Part II of *Burns* immediately addressed itself to the language of §§ 8(a)(5) and 9(a)

which declare the circumstances under which the duty to bargain attaches. On the basis of that language, the Court stated:

> "The Act itself imposes a duty to bargain with the representative of a majority of the employees in an appropriate unit, [so that] the initial issue before the Board was whether the charging union was such a bargaining representative." (*Id.* at 277).

The Court then approved the approach followed by the Board's Trial Examiner, and the Board itself, in addressing that issue:

> "The trial examiner first found that the unit designated by the regional director was an appropriate unit for bargaining.
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> "The trial examiner then found, *inter alia*, that Burns 'had in its employ a majority of Wackenhut's former employees,' and that these employees had already expressed their choice of a bargaining representative in an election held a short time before. Burns was therefore held to have a duty to bargain, which arose when it selected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past." (*Id.* at 277-270.)[12]

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[12] The Board law is not clear as to whether a successor's bargaining obligation depends on the hiring of a "substantial number" or a "majority" of his predecessor's workforce. See *Burns*, 406 U.S. at 281, n. 6, quoting with apparent approval Board counsel's statement that a substantial number suffices. See also *IAM District Lodge 94* v. *NLRB*, 414 F.2d 1135, 1138 (C.A.D.C., Burger, J.), cert. denied, 396 U.S. 889. In *Burns* it was not necessary to confront that issue since the second employer had hired a majority. Nor is that issue relevant in this case since the Company's status as a successor does not turn on the composition of the workforce.

The basis of that approval was that:

> "In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact. Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and Board certification." (*Id.* at 278-279.)

In short, the standards which the Board had developed for successorship in cases like *Burns* were attuned to the precise issue before it —whether the employer is under a duty to bargain pursuant to § 8(a)(5) of the Act. And the requirement that the union be the representative of the successor's employees stems directly from § 9(a) of the Act, to which §8(a)(5) is subject. The determination that the union meets that requirement does not necessarily follow simply because there are some or even many indicia of continuity in the business. The Act itself does not impose on an employer who takes over a continuing business (however defined) a duty to hire or continue the employment of his predecessor's employees. Since the new employer's employees will not necessarily be the same, they will not necessarily choose to be represented by the same bargaining agent. Thus, absent some retention of the workforce, the representative status of the union must be independently determined in the manner in which questions of representation are normally settled (cf. *NLRB* v. *Gissel Mfg. Co.*, 395 U.S. 575), rather than on the basis of a conclusive presumption derived from "continuity • • • on the employer's side,"

(cf. *Burns* 406 U.S. at 305, Rehnquist, J. concurring and dissenting.)[13]

On the other hand, this Court has squarely held that the majority status standards of § 9(a) are not relevant in a suit to enforce a contract under § 301.

> "Had Congress thought that there was any merit in limiting federal jurisdiction to suits on contracts with exclusive bargaining agents, we might have expected Congress explicitly so to provide, for example, by enacting that § 301(a) should be read with § 9(a). Compare § 8(a)(3), § 8(a)(5), § 8(b)(3), § 8(b)(4), § 8(d). Moreover, § 8(f), the 1959 amendment considered supra, 369 U.S., p. 27 contemplates contracting with unions that would not represent a majority. Lastly, if the federal courts' jurisdiction under § 301(a) required a preliminary determination of the representative status of the labor organization involved, potential conflict with the National Labor Relations Board would be increased, • • • and litigation would be much hindered." (*Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17, 29.)

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[13] Our understanding that the *Burns* successorship test is an expression of the principles of §§ 8(a)(5) and 9(a), and not a standard of general application, is confirmed by this Court's recent observation in *Golden State Bottling Co.*, 42 U.S.L.Wk. at 4044, n. 6:

> "A purchasing company cannot be obligated to carry out under § 10(c) every outstanding and unsatisfied order of the Board. For example, because the purchaser is not obligated by the Act to hire any of the predecessor's employees, see *NLRB* v. *Burns Int'l Security Services, Inc., supra*, 406 U.S., at 280 n. 5, the purchaser, if it does not hire any or a majority of those employees, will not be bound by an outstanding order to bargain issued by the Board against the predecessor nor by any order tied to the continuance of the bargaining agent in the unit involved. *Id.* at 280-281."

Notwithstanding *Lion Dry Goods,* which was followed on this point in *Wiley* (see p. 21, *supra,* quoting 376 U.S. 551-552, n. 5), Howard Johnson asserts repeatedly that the federal policy of employee free choice requires that the majority principle followed in *Burns* to determine a duty to bargain, must be applicable for a successorship determination under § 301 as well. It does so although the authority it cites correctly declares that the reason for the majority principle is that *"the making of agreements is impracticable in the absence of a majority rule."* (Co. Br. 9, n. 3, emphasis in original). On the other hand,

> "As has frequently been stated, collective bargaining is not an end in itself. It is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time with results advantageous both to the worker and the employer." (H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 20 (1935).)

It was to achieve a more perfect expression of this policy that Congress in 1947 added §§ 203(d) and 301 to the Act.

Once the agreement has been made, therefore, it no longer, contrary to Co. Br. 27, "draws its substance and validity from continuing union preference among the labor force." Were it otherwise, collective agreements could be abrogated by at any time since it is a commonplace that the identity of the workforce normally fluctuates during the life of an agreement. Indeed, *J. I. Case Co.* v. *Labor Board,* 321 U.S. 332, 335, which defines the nature of the collective agreement, is dispositive:

> "Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier,

> to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service * * * which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established."
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> * * * *
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> "After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out."

There is no reason why employee turnover, which does not affect the parties' obligations under an agreement when the employer remains the same, should be destructive of all obligations thereunder, when "one owner replaces another but the business entity remains the same." (*Wiley*, 376 U.S. at 549.)

II. *WILEY* ESTABLISHES THAT AS GRISSOMS' SUCCESSOR, HOWARD JOHNSON IS UNDER AN OBLIGATION TO ARBITRATE PURSUANT TO GRISSOMS' CONTRACT WITH THE UNION.

We have shown thus far that Howard Johnson's primary argument (that *Burns'* holding as to the nature of the § 8(a)(5) law of successorship modified the § 301 law of successorship as stated in *Wiley*, Co. Br. 7-32) rests on a misreading of part II of the *Burns* opinion: we now show that Howard Johnson's secondary argument (that *Burns'* holding on the § 8 law regarding the successor employer's

obligation to assume his predecessor's collective agreement modified the § 301 law regarding a successor's obligation to arbitrate as stated in *Wiley*, Co. Br. 34-42) rests on a misreading of part III of the *Burns* opinion.

Howard Johnson's contention simply overlooks what was decided in part III of *Burns*. The Board had taken *Wiley* to mean both that the consequence of a successorship determination in a § 301 case is that the entire collective agreement binds the successor willy-nilly, and that the same consequence must follow such a finding in an unfair labor practice case under §§ 8(a)(5) and 8(d). On this basis the Board reasoned that it was required by *Wiley* to abandon its prior uniform holdings that §§ 8(a)(5) and 8(d) do *not* require a successor to assume his predecessor's contract. It was the soundness of these readings of *Wiley* that was at issue in part III of *Burns*. And this Court disagreed with the Board on both points:

> "We do not find *Wiley* controlling in the circumstances here. *Wiley* arose in the context of a § 301 unit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8(d). That decision emphasized '[t]he preference of national labor policy for arbitration as a substitute for tests of strength before contending forces' and held only that the agreement to arbitrate, 'construed in the context of a national labor policy,' survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of extent to which, if any, the surviving company was bound by other provisions of the contract. *Id.* at 549 551
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> "*Wiley's* limited accommodation between the legis-

lative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes does not warrant the Board's holding that the employer commits an unfair labor practice unless he honors the substantive terms of the pre-existing contract. The present case does not involve a § 301 suit; nor does it involve the duty to arbitrate." (406 U.S. at 285-286.)

The Board derived the source of the asserted duty to honor a predecessor's agreement from the law regarding the successor's duty to bargain, as the latter was articulated and approved in part II of *Burns*. The opening sentences of part III state the thesis of the entire discussion that follows; *viz*, that the point of § 8(d) of the Act is that the statutory duty to bargain does not entail a duty to agree:

> "It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed. Section 8(d) of the Act expressly provides that the existence of such bargaining obligation 'does not compel either party to agree to a proposal or require the making of a concession.' Congress has consistently declined to interfere with free collective bargaining and has preferred that device, or voluntary arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes." (406 U.S. at 281-282.)

But while the successor's duty to honor a predecessor's existing promise to arbitrate cannot be extrapolated from §§ 8(a)(5), 8(d) and 9(a), it does not follow that no such duty can be derived from a collective agreement enforceable

under § 301.[14] As the Court reiterated only the other day, "under the National Labor Relations Act, as amended, • • • disputed transactions may implicate both contractual and statutory rights." *Alexander* v. *Gardner-Denver*, —— U.S. ——, 42 U.S.L.Wk. 4214, 4218.[15] Indeed, the distinction between the making of agreements, which was to be left to the parties in the free play of economic force (see *Burns*, 406 U.S. at 287), and the enforcement, preferably by arbitration (see *Wiley*, 376 U.S. at 549), of agreements previously reached, in order to provide a period in which industrial strife was to be discouraged, is at the heart of the Act. The classic statement of this distinction is that of Senator Taft, quoted in *NLRB* v. *Erie Resistor*, 373 U.S. 221, 235, n. 13 cont.:

> "That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract.

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[14] It is well settled that different standards apply under §§ 301 and 8(d). The duty to bargain defined in § 8(d) extends only to "wages, hours and conditions of employment." "As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree." *Labor Board* v. *Borg-Warner*, 356 U.S. 342, 349. When they do reach an agreement on a non-mandatory subject, such a "permissive term" may be enforced in a suit under § 301. *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, 188. On the other hand, "just as § 8(d) defines the obligation to bargain to be with respect to mandatory terms alone, so it prescribes the duty to maintain only mandatory terms without unilateral modification for the duration of the collective-bargaining agreement." (*Id.* at 185-186.)

[15] The Company objects that "the Sixth Circuit's dichotomy between Section 158 and 185 [of 29 U.S.C.] cases for purposes of determining successorship is wholly unworkable, for it occasions

> We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. * * * 93 Cong. Rec. 3835 (1947)."

Burns dealt with the first side of that distinction. The entire discussion revolves about the portions of the 1935 legislative history, the early Wagner Act precedents, the evolution of the "express statutory mandate" of § 8(d), and this Court's decision in *Porter Co.* v. *NLRB*, 397 U.S. 99, in which "this history was reviewed in detail and given controlling effect," all of which were addressed to situations in which there is no *relevant* agreement whatsoever. (406 U.S. at 282-284, 287-288.) At three separate places in the course of that discussion the Court emphasized that its rejection of the Board's rationale stemmed from the absence in *Burns*, of a nexus, like that in *Wiley*, between a collective agreement freely entered into and the obligations sought to be imposed on the successor employer.

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difference in result merely because of the forum chosen." (Co. Br. 29.) But it is inherent in the Congressional scheme of "concurrent overlapping remedies neither preempting the other," (*NLRB* v. *Strong*, 393 U.S. 357, 360), that a party may assert claims under either or both statute and contract. See, *e.g.*, *Smith* v. *Evening News*, 371 U.S. 195; *NLRB* v. *Huttig Sash & Door*, 377 F.2d 964, 969-970 (C.A.8, Blackmun, J.). Since the Board was denied plenary jurisdiction to enforce contracts, see p. 36 *infra*, there will necessarily be situations in which the courts have the power to grant relief under § 301 where none would be available before the Board under § 8. See e.g., *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. at 186-187. When *Lincoln Mills* pointed out that the Act itself furnishes "some substantive law" (353 U.S. at 457, Co. Br. 35), it did not hold that the only rights enforceable by contract are those which have an independent basis in the unfair labor practice provisions of the Act.

"Here there was no merger, sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by § 8(a)(5) and § 9(a). But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract."

• • • •

"The source of [Burns] duty to bargain with the union is not the collective-bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year. Nothing in its actions, however, indicated that Burns was assuming the obligations of the contract.

• • • •

"[I]n a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. Cf. *Oilfield Maintenance Co., Inc.*, 142 N. L. R. B. 1384 (1963). Such a duty does not, however, ensue as a matter of law from the mere fact than an employer is doing the same work in the same place with the same employees as his predecessor, as the Board had recognized until its decision in the instant case." (406 U.S. at 286, 287, 291.)

Thus, *Burns* does not hold that a successor may in no case be bound by operation of law over his objection to observe

his predecessor's agreement, but rather that § 8(a)(5) is not the source of that obligation so that the NLRB is not the proper enforcing tribunal.

Wiley dealt with situations on the other side of the distinction between the making of agreements and the enforcement of agreements already made. For, the source of the duty to honor the arbitration provision of the agreement which the Court declared in *Wiley* was not the statute but "a contract, [to which] Interscience, Wiley's predecessor, was party." (376 U.S. at 550.) And the limitation of § 8(d) relied on in *Burns*, is not addressed to the enforcement of agreements already made. On the contrary, while the 1947 Congress was critical of the Board for making agreements for the parties (see *Burns*, 406 U.S. at 283), another of its major concerns was that valid agreements were too frequently dishonored.

Accordingly, by § 301, Congress provided that contracts between unions and employers shall be binding and enforceable. That provision commits the responsibility for "the enforcement [of such contracts] to the usual processes of the law and not to the National Labor Relations Board." (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42. See *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 508-513; *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. at, 186-187.) And the "process by which agreements, though not formalized in writing, may be 'implied' " by the courts, is familiar to the law of contracts. (See *Perry* v. *Sindermann*, 408 U.S. 593, 601-602; *Wood* v. *Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 111 N.E. 214 (Cardozo, J.).) It is by that process that this Court determined "that a contractual commitment to submit disagreements to final and binding arbitration gives rise to an

implied obligation not to strike over such disputes," (*Gateway Coal Co.* v. *United Mine Workers*, —— U.S. ——, 42 U.S.L.Wk. 4095, 4099, describing *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95 and *Boys Markets* v. *Retail Clerks*, 398 U.S. 235.) And it is that process which has been utilized in deriving from § 203(d) of the Act "the now well-known presumption of arbitrability for labor disputes." (*Gateway Coal*, 42 U.S.L.Wk. at 4098, referring to the *Steelworkers* trilogy, *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 and companion cases.)

That presumption governed the decision in *Wiley* (376 U.S. at 550; emphasis in original):

> "[A]lthough the duty to arbitrate, • • • must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.[4] This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience. Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of national labor policy."
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> "[4] Compare the principle that when a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, *national labor policy* requires, within reason, that an interpretation that covers the asserted dispute, [*Steelworkers* v.] *Warrior & Gulf*, [363 U.S.] pp. 582-583, be favored."

The limited office of the presumption of arbitrability is to establish that where the parties have provided for

arbitration at all, any given dispute will be subject thereto unless the parties have consciously determined to exclude it. Just as the parties can expressly exclude specific issues from arbitration, so they can specifically provide that an arbitration provision will not survive some or all changes in the enterprise, such as, for example, a merger. The presumption operates in the same manner as the *Lucas Flour* rule whereunder a no-strike obligation is implied from mandatory grievance arbitration, unless it is expressly negated:

> "Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in Boys Markets. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." (*Gateway Coal*, 42 U.S.L.Wk. at 4100.)

Thus, *Wiley* is at a yet further remove from *Burns*. The former does not require survival even of the arbitration provision for it announces only a presumption of arbitrability. The Board's ill-fated *Burns* decision had announced a rule of public law overriding any contrary intent of the parties that the entire contract is binding on the successor.

The limited scope of the *Wiley* rule has profound practi-

cal significance: the "flexible procedures of arbitration" assure the successor that the extent of his obligations will be determined within the confines of the agreement and on the basis of the realities and equities in each particular case.[16] As the Third Circuit stated in *United Steelworkers of America* v. *Reliance Universal, Inc.*, 335 F.2d 891 (C.A.3):

> "Although the preexisting labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand. The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find that equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract." (*Id.* at 295).

The court below well understood that in this respect also the *Wiley* rule stands in sharp contrast to the Board law disapproved in *Burns*. After quoting the foregoing passage from *Reliance Universal* (Pet. App. 10a) that Court continued:

> "The NLRB in its *Burns* decision had adopted an all-or-nothing approach. If the employer was a successor

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[16] See *Wiley*, 376 U.S. at 546-547, quoting *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241, and also citing *Warrior & Gulf*, *supra*, 363 U.S. at 582.

> then it was required to honor *all* of the terms of the predecessor's agreement. If not a successor, it did not have to honor any part of the predecessor's agreement. *Burns Int'l. Services, Inc.*, 182 NLRB 348 (1970). • • • As noted by the Supreme Court in *Burns* the Board's position would lead to rigidity in labor relations. • • • In arbitration proceedings as ordered below such rigidity is not present." (Pet. App. 10a-11a.)

We have thus seen that part III of the *Burns* opinion, by distinguishing *Wiley*, established that the consequence of a successorship finding (like the identification of the successor, which is the first step in the analysis, see pp. 18-29, *supra*), depends on the context in which the issue arises. And that analysis is further confirmed by the Court's most recent confrontation with successorship in *Golden State Bottling Co., supra*. There the ultimate issue was:

> "[W]hether the bona fide purchaser of a business, who acquires and continues the business with knowledge that his predecessor has committed an unfair labor practice in the discharge of an employee, may be ordered by the National Labor Relations Board to reinstate the employee with back pay." (42 U.S.L.Wk. at 4040).

That question was answered in the affirmative. All American, which purchased the assets of Golden State, did not deny that it was Golden State's successor, so that it was unnecessary for the Court to formulate standards for determining successorship in cases that turn on the reach of a remedial order. But All American did contest its duty to remedy Golden State's unfair labor practices, including the Board order that it reinstate an employee who had been illegally discharged by Golden State. In discussing that

problem, the Court after reaffirming both *Wiley* and *Burns* (*id.* at 4042-4044), addressed itself to the particular policies of the Act which were implicated by the Board's effort to require the successor to remedy his predecessor's unfair labor practice and differentiated those from those which were involved in *Burns*. (*Id.* at 4044, and particularly n. 6, quoted at p. 28, n. 13, *supra.*) If *Burns* had established a universal rule to govern all successorship cases, it would have not only been pointless, it would have been impossible for this Court in *Golden State* to first differentiate *Wiley* and *Burns*, and then to differentiate *Golden State* from both.

In sum, Petitioner's thesis is that the present § 301 suit for an order to arbitrate is governed not by *Wiley*, which also was a § 301 suit for such an order, but by *Burns*, which decided that a successor who has a § 8(a)(5) duty to bargain, nevertheless does not have a duty derived from that statutory provision to assume his predecessor's contract. The Company's argument is the converse of the one which was made and rejected in *Burns*, *viz.*, that a successor under Board law has a § 8(a)(5) duty to assume the whole contract because *Wiley* had held that an employer who becomes a successor under the different § 301 standard has a contractual duty to arbitrate. This supposed equation is no more valid now when it is asserted by an employer than it was in *Burns* where it was asserted by the other side. Even as *Wiley* did not control *Burns*, *Burns* does not govern this case. For this case differs from *Burns*, even as it is identical to *Wiley*.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

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